Supreme Court, U.S.
FILED
FEB 17 1998
CLERK

No. 97-746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GENERAL MOTORS CORPORATION,
Petitioner,

v.

VALERIE LYNN GREAR AND PAUL C. NORDBERG,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a circuit court of appeals is jurisdictionally barred from hearing an appeal from a trial court order compelling the disclosure of privileged communications, or whether such an appeal properly comes within the "collateral order" doctrine laid down by the Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)?

2. Whether a circuit court of appeals is jurisdictionally barred from reviewing a petition for mandamus taken from a trial court order compelling the disclosure of privileged communications because a party is obliged to disobey the order and go into contempt before it can seek any review on the merits?

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REPLY BRIEF FOR PETITIONER

Respondents make two points in their brief in opposition to *certiorari*. First, they concede that the circuit courts are split on the basic procedural issue raised in the petition: whether a court of appeals lacks jurisdiction to entertain either an interlocutory appeal or a petition for writ of mandamus that challenges a trial court order compelling disclosure of privileged communications. *See* Opp. 7. General Motors believes that the issue poses a three-way circuit split, and that the decision below imposes an undue burden upon litigants seeking to protect privileged documents. Respondents suggest that the circuit split is only two-way, but in any event do not deny that the courts of appeals are divided and confused in this area. *See id.*

Respondents also do not contest that the questions presented in this case pose important issues of judicial administration that should be clarified for lower courts and litigants alike. Instead, their second point is that they ultimately should prevail on the merits of the privilege questions at stake in the underlying case. *See* Opp. 10-11. Although General Motors strongly takes issue with this claim, at this juncture, questions about the merits simply are not germane to the jurisdictional issues raised in the petition.

Once again, the issue at stake here is what mechanism for relief shall be available to litigants in the federal courts to seek immediate relief from an order requiring the disclosure of documents that are protected by the attorney-client privilege. The Third Circuit has recently ruled that a party may take an interlocutory appeal in these circumstances under 28 U.S.C. § 1291, and that mandamus relief is also available pursuant to 28 U.S.C. § 1651 as an alternative means of obtaining immediate review. *In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997).

In contrast, most courts do not permit an interlocutory appeal in those circumstances, but do permit a party to seek immediate relief by means of a petition for mandamus. *See, e.g., In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1387 (Fed. Cir. 1996), *cert. denied*, 117 S. Ct. 1484 (1997); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 163 (2d Cir. 1992); *Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1490-92 (9th Cir. 1989); *In re Burlington Northern, Inc.*, 882 F.2d 518, 522 (5th Cir. 1987); *Jenkins v. Weinshienk*, 670 F.2d 915, 917 (10th Cir. 1982); *Rowley v. McMillan*, 502 F.2d 1326, 1335 (4th Cir. 1974); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 492 (7th Cir. 1970), *aff'd by equally divided Court*, 400 U.S. 348 (1971).

In this case, however, the Sixth Circuit panel imposed a far more draconian rule, holding that in these circumstances a party may not appeal from the trial court order and also may not pursue mandamus relief -- indeed, that both avenues of relief are *barred* on jurisdictional grounds. *See* Pet. App. 14a-15a;

see also id. 16a-17a. It held that in order to obtain immediate review, a party must go into contempt of the trial court order and then seek to appeal from the imposition of contempt sanctions. The other circuits have uniformly rejected this position, noting that sanctions imposed against a party are not subject to immediate appeal unless the trial court chooses to proceed by way of criminal contempt, rather than through civil coercive contempt or by imposing some form of discovery sanctions. *See, e.g., Admiral Ins. Co.*, 881 F.2d at 1490-92. They have thus recognized that forcing a party to disobey the trial court's order and submit to sanctions offers no assurance that the party can avoid irreparable harm by pursuing an immediate appeal.

Respondents do not attempt to defend the ruling below on this central jurisdictional issue. Instead, they suggest that the Sixth Circuit itself is divided on the proper approach, pointing to a more recent ruling by a different panel of three other judges that adhered to the more traditional rule employed by other circuits, which allows privilege issues to be adjudicated on an interlocutory basis through mandamus review. *See In re Perrigo Co.*, 128 F.3d 430, 436-37 (6th Cir. 1997) (quoting and citing, *inter alia*, *Chase Manhattan Bank*, 964 F.2d at 163-65, and *Admiral Ins. Co.*, 881 F.2d at 1492-94). That ruling, significantly, does not ever mention or seek to distinguish the rulings and orders in this case. It also does not mention or seek to distinguish the Third Circuit's recent ruling in the *Ford Motor Co.* case, which allows parties to seek review of such orders by *both* mandamus *and* a permissible interlocutory appeal under the doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Indeed, the *Perrigo* panel cites with approval the Third Circuit's earlier decision in *In re School Asbestos Litig.*, 977 F.2d 764 (3d Cir. 1992), which had allowed mandamus review, but not an appeal, in these circumstances, apparently mistaking it to be the Third Circuit's

current approach to the procedural issue raised here. *See Perrigo*, 128 F.3d at 435.[1]

The panel decision in the *Perrigo* case thus echoes decisions by other circuits that have at times -- reflecting no orderly or consistent pattern -- held that the more drastic contempt route is a jurisdictional requisite before either mandamus or an appeal can be pursued in an interlocutory setting. *See, e.g., In re Kessler*, 100 F.3d 1015, 1016-18 (D.C. Cir. 1996) ("in the ordinary case, a litigant dissatisfied with a district court's discovery order must disobey the order, be held in contempt of court, and then appeal that contempt order on the ground that the discovery order was an abuse of discretion").[2] General Motors has already explained at length why this view is flawed -- because it effectively eliminates any mandamus review, because it mistakenly assumes that a party in this impasse can merely opt for criminal contempt, and because forcing parties into contempt is unsatisfactory as a matter of basic judicial administration, *see* Pet. 12-17 -- and so will not reprise those arguments here.

The recurring problem in this whole area of the law is that the lower courts have tended to mix inapposite lines of authority without appreciating the dramatically different effects of the same procedures in different settings. For example, the orders below in this case, without comment or discussion, rely in turn on the Sixth Circuit's inconsistent prior rulings in

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[1] The party petitioning for mandamus in *Perrigo* had also sought to bring an interlocutory appeal in that case to challenge the trial court's privilege ruling, which was denied. *See* 128 F.3d at 434.

[2] Like the decision of the Sixth Circuit panel in this case, the D.C. Circuit in *Kessler* did not explain or substantiate its bare assertion that if "Dr. Kessler does disobey the district court's order and is held in contempt, he will have a right to an appeal." 100 F.3d at 1018. As explained in the petition for *certiorari*, this will only be true where the trial court decides to proceed by means of criminal contempt, rather than by means of coercive civil contempt or by imposing some form of discovery sanctions against a party litigant. *See* Pet. 14-15.

Coleman v. American Red Cross, 979 F.2d 1135 (6th Cir. 1992) (allowing an interlocutory appeal), *United States v. James T. Barnes & Co.*, 758 F.2d 146 (6th Cir. 1985) (requiring a party to submit to contempt in order to challenge privilege rulings by the trial court), and *Dow Chem. Co. v. Taylor*, 519 F.2d 352 (6th Cir. 1975) (disallowing an interlocutory appeal but allowing mandamus review), which, in turn, have never been reconciled. Many of these rulings -- along with the D.C. Circuit's decision in the *Kessler* case -- trace their favorable references to the contempt route as the most appropriate and perhaps the only permissible avenue for obtaining immediate review of such trial court orders to *United States v. Ryan*, 402 U.S. 530 (1971), where this Court held that contempt was an available mechanism for seeking review of a trial court order requiring the production of records:

> But compliance is not the only course open to respondent. If, as he claims, the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or other similar proceedings are brought against him. Should his contentions be rejected at that time by the trial court, they will then be ripe for appellate review.

Id. at 532.

This doctrinal lineage, however, is fundamentally flawed. *Ryan* involved production of documents by a nonparty before a federal grand jury. In that instance, not only is the underlying case criminal in nature, but also any proceedings against a nonparty necessarily result in a separate, final judgment against the nonparty that will be appealable by him or her immediately. These considerations, however, cannot simply be imported into proceedings in *civil* cases involving a *party* to the litigation, which do not lead to the same results either as a matter of procedure or substance. Nonetheless, courts frequently place mistaken reliance upon *Ryan* in arriving at results that garble and misapply the underlying legal rules. *See, e.g.*, *Dow Chem. Co.*, 519 F.2d at 355 ("*Ryan* involved production of documents

before a federal grand jury, but we think the reasoning of the Court is applicable here" in a civil case where the order was directed at a party); *Coleman*, 979 F.2d at 1138 ("A litigant faced with an adverse discovery order may obtain review, however, by violating the order and incurring sanctions or a contempt citation.") (quoting and citing this same passage from *Dow Chem. Co.*); *Kessler*, 100 F.3d at 1017 ("an order holding a litigant in contempt for failing to obey a discovery order is considered final," even supposedly in a civil case involving a party defendant) (citing *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18 n.11 (1992) (citing in turn *Ryan*)).

There is no question -- and, again, respondents do not dispute -- that the lower courts are confused and divided over the important procedural question raised here. Some courts, at some times, hold that neither appeal nor mandamus will lie to protect a party's assertion of privilege, but instead the party must proceed by flouting the trial court order and seeking to be held in contempt -- an avenue that, the courts fail to recognize, may or may not produce an appealable order. Other courts generally hold that a party cannot take an appeal in this situation, but may proceed by way of mandamus. The Third Circuit, in an opinion whose cogent analysis of the *Cohen* doctrine has yet to be refuted by any other court, has held that a party *can* take an interlocutory appeal to protect the attorney-client privilege, and can also proceed in the alternative by means of mandamus. This three-way split among the circuit courts on an issue so basic to judicial administration and so critical to the preservation of the legally sacrosanct attorney-client privilege needs to be addressed and clearly resolved by this Court.

The issue is also cleanly and properly presented in this case. Here, the Sixth Circuit held that it was *jurisdictionally barred* from considering either General Motors' appeal or its mandamus filings because General Motors instead was required to go into contempt to challenge the trial court's order compelling the disclosure of privileged documents. *See* Pet. App. 14a-15a; *see also id.* at 16a-17a. Thus, General Motors has had no appellate review at all of its underlying claims to

protect the full scope of its lawful privilege. If instead the position of many circuits were to be adopted, General Motors would be entitled to immediate review of its claims, but only under the more demanding standards that apply to applications for writ of mandamus. *See, e.g.*, *Perrigo*, 128 F.3d at 435 (to justify mandamus relief, petitioner must show not only clear error, but also that the order in question "raises new and important problems, or issues of law of first impression"). And if instead the position of the Third Circuit were to be adopted, General Motors would be entitled to immediate review of its claims under the straightforward legal standards governing appeals, which merely require showing that the trial court committed reversible error in rendering its ruling. The petition for *certiorari* thus warrants plenary review here.

Two final points deserve brief mention here. *First*, General Motors has already defused the issue that was urgently presented in its earlier stay application by disclosing to respondents the privileged documents at issue in the underlying proceeding, subject to the terms of a protective order that was imposed by the trial court. Nonetheless, as discussed at greater length in the supplemental brief that General Motors filed on December 18, 1997, the disclosure of these documents does not moot any of the important issues presented on the merits of General Motors' underlying claims of privilege, which remain pertinent with respect to the admissibility and use of the documents at trial. *See* Supp. Br. 3.[3]

Second, respondents have repeated their claim that, in any event, they will be entitled to prevail on the merits of their

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[3] General Motors also noted that as to the compelled pre-trial disclosure of privileged documents, the restrictive nature of the Sixth Circuit's rulings guarantees that the issue is one "'capable of repetition, yet evading review.'" Supp. Br. 3 (quoting *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 514-15 (1911)). The more recent *Perrigo* ruling does not change this at all, though it adds a certain freakish quality to the circumstances in which this issue may arise, depending on which judges of that court and other courts are assigned to review such issues in a given case.

claim that General Motors waived the attorney-client privilege with respect to these documents. *See* Opp. 10-12. Of course, General Motors tried to join issue on the merits of this underlying dispute when it filed its appeal and mandamus petition in the Sixth Circuit. It is plain from the orders issued below that both applications were denied on jurisdictional grounds, *not* on the merits. *See* Pet. App. 15a (holding that General Motors could not take an interlocutory appeal, because "if a party seeks an immediate appeal of the matter, the party should submit to contempt and then appeal the contempt ruling"); *see also id.* 16a-17a (denying mandamus because a party "seeking mandamus must have no other means of obtaining the relief he desires" and General Motors "can obtain appellate review by submitting to contempt and appealing the contempt ruling"). Respondents' observation that two other trial courts have rendered rulings similar to that rendered by the trial court in this case is simply beside the point, because the issue here involves the preliminary question of whether and how a party like General Motors can obtain effective review of such rulings from a circuit court of appeals.[4]

Even on the merits, however, the substantive issues raised by General Motors in the underlying proceeding are substantial in their own right. The trial court order compelling the disclosure of privileged communications raises unsettled questions about the extent to which an extra-textual

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[4] Of course, the unexplained fact that the Fifth Circuit denied a writ of mandamus in *Maxey v. General Motors Corp.*, No. 96-60861 (5th Cir. Jan. 6, 1997), *see* Opp. App. 15a, does not advance the inquiry at all; if anything, by ruling contrary to the jurisdictional holding reached in the Sixth Circuit's orders in this case, it underscores the circuit split on the issue of whether an interlocutory appeal or mandamus relief should be available in this situation. The settlement reached in *Baranowski v. General Motors Corp.*, No. 97-2968EALR (8th Cir.), *voluntarily dismissed*, after the Eighth Circuit had ordered the case set for briefing and argument on the jurisdictional issue of whether appeal or mandamus should lie from such trial court orders, also merely underscores the need to clarify this issue for the benefit of all the lower federal courts.

requirement to create a privilege log can properly be imported into Rule 26 of the Federal Rules of Civil Procedure. On its face, the Rule contains no such rigid requirement; instead, it merely requires a party raising a privilege objection to "make the claim expressly" and to "describe the nature of the documents" sufficiently to "enable other parties to assess the applicability of the privilege." *See* Fed. R. Civ. P. 26(b)(5). On the facts of this case, it is plain that General Motors complied with the absolute letter and spirit of this Rule; yet the trial court erroneously found a waiver of the privilege. Such issues of waiver are typically important enough to warrant review and resolution by means of immediate appeal, *see, e.g.*, *Ford Motor Co.*, 110 F.3d at 965 n.10, or on mandamus, *see, e.g.*, *Perrigo*, 128 F.3d at 438-39, yet General Motors has had no meaningful opportunity to obtain review of the orders imposed in this case. That is the sole issue squarely before the Court at this time, and it merits plenary review.

More importantly, respondents do not and cannot dispute that the procedural issues cleanly raised by the petition for *certiorari* directly affect every circuit court and district court throughout the nation. In order to facilitate sound judicial administration, the Court should seize this opportunity to establish a clear and uniform rule governing the proper relationship between trial courts and reviewing courts in allowing a party to vindicate a rightful claim of attorney-client privilege, which has long served to "promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Those broader interests have been disserved in this case, and will continue to be disserved as long as the lower courts continue to maintain inconsistent approaches to the basic procedural issue that is presented to the Court in this case.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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